OFFICE OF PROGRAM RESEARCH

State of Washington House of Representatives

M E M O R A N D U M

To: Members of the Fisheries, Ecology & Parks Committee
From: Jason Callahan, Committee Counsel (786-7117)
Date: December 12, 2003
RE: Geoduck Management in Washington

The 2003 interim plan for the Fisheries, Ecology, & Parks Committee includes a series of hearings on geoduck[1] management in Washington. The purpose of this memorandum is to summarize in an organized and readable manner the sizable amount of information gathered by the committee during the hearings this interim and during the 2003 session. This memorandum is organized under a series of section headings that detail the management roles and responsibilities of the various state and non-state geoduck fishery interests. Although this list is not exhaustive, the interests include:

[1] The term "geoduck" in this memorandum will refer to the geoduck clam, or *Panopea abrupta*. The name "geoduck" apparently comes from the Nisqually tribe's word "*gweduc*," meaning "to dig deep." According to Justin Bookey, producer of the documentary "3 Feet Under: Digging Deep for the Geoduck Clam", the name "geoduck" was originally written "goeduck" to approximate the original pronunciation. However, an East Coast dictionary transposed the letters, and the spelling remains with us today.

A. The Department of Fish and Wildlife

I. Resource Management

The Fish and Wildlife Commission and the Washington Department of Fish and Wildlife (WDFW) are responsible for managing the state's fishery resources. This includes specifying the time, place, and manner in which shellfish may be harvested.[2] The law requires that the shellfish management activities of the WDFW protect and perpetuate shellfish and conserve shellfish resources in a manner that does not impair the resource.[3]

To accomplish in this mission, the WDFW has established six geoduck management regions within Puget Sound.[4] Each of these regions is further identified by multiple individual tracts. Some of the tracts are open for commercial harvest, while others are considered non-commercial tracts. Tracts can be designated by the WDFW as non-commercial for a number of reasons. These reasons can include water depth,[5] pollution levels,[6] density of geoducks, quality of product, harvesting difficulty, or conflicts with endangered species.[7]

The WDFW has the primary responsibility to conduct geoduck resource assessments and to set the total allowable catch[8]. Population assessments generally involve the design of population survey techniques, conducting underwater pre- and post-harvest surveys, and projecting population numbers.[9] The population assessments lead to the calculation of a total available catch, or TAC. The TAC is calculated for each tract and represents the cumulative poundage of geoducks that can be removed in a year by both the state and the tribes. The TAC represents

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[2] See RCW 77.12.047(1)(c). This section outlines the authority given to the Fish and Wildlife Commission to adopt rules.

[3] See RCW 77.04.012.

[4] The six regions are: San Juan Islands, Strait of Juan de Fuca, Hood Canal, North Sound, Central Sound, and South Sound. See WDFW presentation to the House Fisheries, Ecology & Parks Committee, June 23, 2003, Olympia.

[5] Geoducks may not be harvested in water that is shallower that 18 feet, or deeper than 70 feet. See RCW 77.60.070(1) & WAC 220-52-019(11)

[6] This factor will be addressed in more detail below; however, pollution levels are generally monitored by the Department of Health.

[7] See WDFW presentation to the House Fisheries, Ecology & Parks Committee, June 23, 2003, Olympia.

[8] See The memorandum of understanding between the State of Washington Department of Natural Resources and the State of Washington Department of Fish and Wildlife; agreement number FY02-200.

[9] See WDFW presentation to the House Fisheries, Ecology & Parks Committee, June 23, 2003, Olympia.

2.7% of the total geoduck biomass in a tract.[10]

The WDFW also has the primary responsibility to conduct studies that investigate mortality and recovery rates on the tracts. These studies look at the recovery of naturally spawning stocks, as well as stocks that are artificially enhanced.[11] In addition, the WDFW takes the lead in conducting studies on the effects of geoduck harvest on eelgrass and other environmental impacts.[12]

II. Enforcement

Enforcement of the geoduck fishery has two components: 1) enforcement of the fishery regulations and 2) enforcement of the harvest's contract provisions. These responsibilities are generally shared between the WDFW and the Department of Natural Resources (DNR), as outlined in a memorandum of understanding entered into by the two state agencies.

The WDFW employs commissioned fish and wildlife enforcement officers who are primarily assigned to enforce the criminal provisions of the Fish and Wildlife Code.[13] These officers have the authority to stop citizens engaged in geoduck harvest and inspect all licenses and harvested product.[14] In addition, enforcement officers may search a vessel or seize harvested geoduck without a warrant if the officer has probable cause to believe that the geoducks were harvested unlawfully.[15] If a commercial harvester is found to be in violation of the fishery rules, the enforcement officer may arrest that harvester without a warrant.[16]

In contrast, the DNR has a limited law enforcement role. As a limited authority law enforcement agency, the DNR's authority to enforce regulations is limited to the scope of their agency's

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[10] See WDFW presentation to the House Fisheries, Ecology & Parks Committee, June 23, 2003, Olympia. The total biomass of a tract, from which the TAC is calculated, is estimated by multiplying the mean density of geoducks by the mean weight of the geoducks by the tract area.

[11] See The memorandum of understanding between the State of Washington Department of Natural Resources and the State of Washington Department of Fish and Wildlife; agreement number FY02-200. See also RCW 77.04.120. This section directs the WDFW to investigate the supply of shellfish.

[12] See WDFW presentation to the House Fisheries, Ecology & Parks Committee, June 23, 2003, Olympia.

[13] See RCW 77.15.075. Although primarily associated with the Fish and Wildlife Code, fish and wildlife enforcement officers have general law enforcement authority.

[14] See RCW 77.15.080. The ability to stop a geoduck harvester need only be based on an articulable fact that the person is harvesting geoduck, and not on any probably cause that the harvest is unlawful.

[15] See RCW 77.15.096 & 77.15.085.

[16] See RCW 77.15.092.

jurisdiction.[17] In the case of geoducks, the agency is limited to enforcing the appropriate statutes, administrative rules, and contract provisions.

The DNR has agreed to inform the WDFW whenever its employees observe a violation of a geoduck fishery rule, and in return, the WDFW has agreed to inform the DNR if its officers observe a violation of a geoduck harvest agreement. All pertinent information is expected to be shared between the agencies within 48 hours orally first, and followed-up in writing.[18]

B. The Department of Natural Resources

I. Aquatic Lands Management

Upon statehood, Washington claimed title to the aquatic lands of the state up to the ordinary high tide line.[19] Today, the state owns a total of 2,179,840 acres of aquatic lands, and 8,000 linear miles of tidelands and shorelands.[20] The DNR has been delegated the authority to execute leases on these lands,[21] sell materials from aquatic land,[22] and perform other management functions.

Revenue generated by the state from the lease of its aquatic lands, and from the sale of valuable materials from aquatic lands, is divided between two accounts. Fifty percent of the money collected is deposited into the Resource Management Cost Account and used to fund the DNR's management activities.[23] The other fifty percent of the revenue is deposited into the Aquatic Lands Enhancement Account. This account is used to provide enhancement to aquatic lands, aquatic lands protections and purchase for public uses, improving access to aquatic lands, and

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[17] See RCW 10.93.020.

[18] See The memorandum of understanding between the State of Washington Department of Natural Resources and the State of Washington Department of Fish and Wildlife; agreement number FY02-200.

[19] See Washington Constitution Article XVII.

[20] See the Aquatic Lands Strategic Plan developed by the Department of Natural Resources in December 1992. Due to a period in the state's history when the state was authorized to sell aquatic lands, there is some aquatic acreage in private ownership. The practice of selling state-owned aquatic lands to private hands was prohibited by the Legislature after 1971. This prohibition currently resides in RCW 79.94.150(2).

[21] See RCW 79.90.480 et seq.

[22] See RCW 79.90.300 se seq.

[23] See RCW 79.64.040.

other projects as directed by the Legislature.[24]

The DNR is directed in statute to designate the areas of state-owned aquatic lands that are available for geoduck harvesting.[25] However, once designated, the DNR is not necessarily free to contract for harvest from tracts located on that land. Some local jurisdictions have interpreted the Shorelines Management Act[26] to first require the DNR to obtain a substantial development permit from the appropriate local government before a geoduck harvest can commence. A substantial development permit is required of any entity, including a state agency, wishing to engage in substantial development on a shoreline.[27] The DNR, as a permit applicant, has the burden of proving to the local government that the harvest of geoducks is consistent with the local government's shorelines master program.[28] Currently, the DNR has obtained either substantial development permits, or exemptions from the permit requirement, from a number of Puget Sound local governments for the harvest of geoduck. The DNR has been denied a permit from Kitsap County to harvest geoduck due to a decision by the county that there is insufficient information to make a decision.[29]

II. Sale of Geoducks

The Legislature has declared that geoducks are to be sold as valuable materials.[30] This treatment differs from mobile shellfish, such as crabs, which are treated like a traditional wildlife resource.[31] Treatment of embedded naturally-occurring shellfish as private property belonging to the owner of the aquatic land has been confirmed by the state Supreme Court as mirroring the common law of the state, although it is unclear if the common law extended to publicly-owned

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[24] See RCW 79.24.540. The Aquatic Lands Enhancement Account is often referred to by its acronym, ALEA.

[25] See RCW 79.96.085

[26] See Chapter 90.58 RCW

[27] See RCW 90.58.140(2); however, the definition of "substantial development" is contained in RCW 90.58.030(3) and includes any development valued over $5,000. The term "development" is defined in the same section to include dredging and drilling.

[28] See RCW 90.58.140(7).

[29] See Kitsap County Office of the Hearing Examiner's Report and Decision, permit number 747. Pursuant to the Shorelines Management Act, the DNR has appealed Kitsap County's decision to the Shorelines Hearing Board. A decision by the Board should be released early in 2004.

[30] See RCW 79.96.080.

[31] See RCW Tile 77.

tidelands.[32]

Generally, valuable material sales are awarded to the highest responsible bidder; however, there is an enumerated list of factors, other than bid price, that the DNR may consider before awarding a sales contract. These include the bidder's ability to perform the contract, whether the bidder has previously complied with the terms of past contracts, whether the bidder has been convicted of a crime related to public lands, and whether the bidder is controlled by, or will subcontract with, bidders that are not responsible. If the DNR finds that the high bidder satisfies any of these criteria, it can offer the sale to the next highest bidder, or cancel the sale altogether. In addition, the DNR may pass over a high bidder if a bidder is found to have been a previous high bidder that failed to complete the terms of resulting contract anytime after January 1, 2003.[33]

Upon confirmation of a sale, the DNR and the winning bidder enter into a harvest agreement. This agreement, which becomes the basis of a geoduck fishery license, is subject to any terms and conditions deemed necessary by the DNR.[34] These terms include the harvest area and harvest quantity. The terms and conditions placed into the agreements by the DNR may also include provisions for the enforcement of the agreement. In addition to enforcement provisions, the DNR is authorized to enforce the terms of the agreements through either suspension or cancellation of the agreement.[35]

If a harvesting agreement is silent on the ability of the harvester to terminate an agreement, then state law provides a penalty-free termination if the agreed to geoduck harvest cannot be completed due to the actions of a governmental agency. This option is available to the harvester only if the actions of the government are beyond the control of the harvester, the actions delay harvest for more than thirty days, and the DNR has not added provisions to the harvesting agreement limiting or eliminating the harvester's options. If a harvester lawfully terminates an agreement, he or she must be reimbursed any money paid to the DNR pursuant to the agreement, less the value of any geoducks already harvested.[36]

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[32] See State v. Longshore, 5 P.3d 1256 (2000). The court noted that Washington's common law treatment of embedded naturally-occurring shellfish as property is the minority treatment among the other states.

[33] See RCW 79.90.215, as amended by C 028 Laws of 2003.

[34] See RCW 79.96.080(1).

[35] See RCW 79.96.080.

[36] See RCW 79.96.080(1)

III. State Geoduck Replanting

Unlike state timber sales[37], a harvester of geoducks is not under an obligation to replant the harvested tract.[38] However, the DNR has the express authority to enter into an agreement with the WDFW for the development of an intensive geoduck management plan, including the operation of a geoduck hatchery. At this time, the state does not operate such a hatchery.

In 1990, the DNR was required to submit a report to the Legislature evaluating the progress of a geoduck management plan.[39] As part of its intensive management plan, the DNR operated a geoduck hatchery from 1983 through the early 1990's. Throughout the 1980's the DNR was able to develop technology to successfully allow for the commercial production of geoduck larvae and seeds. However, they were unable to successfully plant the seed in a large-scale cost-effective manner. After conducting a cost-benefit analysis, the DNR recommended that further evaluations be conducted regarding the state's need for a full-scale commercial geoduck hatchery and nursery operation. The report concluded that continued operation of the hatchery was not economially feasible since it cost the same amount to raise a geoduck to two pounds as two pounds of the product was worth on the open market.[40]

In 2003, the Legislature again turned its attention to geoduck aquaculture. The 2003 operating budget contains a $265,000 direct appropriation from the Aquatic Lands Enhancement Account to develop a pilot project that will study the feasibility of geoduck aquaculture. The pilot project will be focused on both the intertidal and subtidal lands in Washington. It is unclear in the language of the proviso if the project must focus on aquaculture on state-owned aquatic lands, or if private tidelands can also participate in the project.[41]

C. The Department of Health

All shellfish sold in Washington must bear a certificate of compliance with the state's sanitary standards.[42] These certificates are issued by the Department of Health pursuant to standards developed by the State Board of Health. By law, the standards must be reasonable requirements

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[37] See Chapter 76.09 RCW.

[38] The DNR does, however, have the authority to require replanting as part of the harvesting agreement.

[39] See RCW 79.96.906.

[40] See Evaluation of the Intensive Management Program for the Geoduck Resource, submitted to the Legislature by the Department of Natural Resources, December 1, 1990. In the report, the DNR noted that in order to artificially increase harvest by five million pounds, the state would need to invest at least $515,000 in capital investments and $185,000 in annual operating costs.

[41] See Chapter 25, Section 308(15), Laws Of Washington 2003, 1st Special Session.

[42] See RCW 69.30.020.

governing the sanitation of shellfish and shellfish growing areas.[43] Geoduck sales are subject to this certification requirement.[44]

Prior to issuing a certificate of compliance, the Department of Health is required to inspect the shellfish growing area to ensure that it meets the appropriate sanitation standards. Once issued, the certificate is valid for twelve months, unless revoked by the Department of Health.[45] A person in possession of geoducks harvested from an uncertified bed may be found guilty of a gross misdemeanor, and the product in his or her possession will be disposed of.[46] In addition to criminal sanctions, a violator can also be ordered to pay civil fines up to $500 per day for every violation.[47]

The DNR and the Department of Health have executed a formal agreement that allows DNR employees to assist with the collection of bacteriological water samples, which are necessary in determining if a shellfish growing area meets the necessary sanitation standards. The interagency agreement requires the Department of Health to, among other things, provide training to DNR staff in bacteriological sampling procedures, determine the location and timing of sampling events, provide the DNR staff with the needed sampling equipment, and provide periodic oversight. For its part, the DNR has agreed to collect the water quality samples on the schedule developed by the Department of Health, transport the samples to the Department of Health's laboratory, and notify the Department of Health of any known pollution events.[48]

D. Geoduck Harvesters

I. Geoduck License Requirements

The WDFW is responsible for issuing geoduck divers licenses and geoduck fishery licenses, a combination of which are required of anyone wishing to participate in a commercial geoduck fishery.[49] In order to be granted a fishery license, the purchaser must first enter into a valid

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[43] See RCW 69.30.030.

[44] See RCW 69.30.010(1). The definition of "shellfish" includes clams, of which geoducks are a variety.

[45] See RCW 69.30.050.

[46] See RCW 69.30.110 & 69.30.140.

[47] See RCW 69.30.150.

[48] See The Interagency Agreement Between the State of Washington Department of Natural Resources and the State of Washington Department of Health; agreement number 97-138. According to the terms of the document, this agreement will remain in effect until December 31, 2005.

[49] See RCW 77.65.410 & 77.70.220(1). This license requirement only applies to the commercial harvest of naturally-occurring geoduck. Private sector cultured geoduck fall under a separate regulatory scheme which will be

geoduck harvest agreement with the Department of Natural Resources.[50] A copy of the harvest agreement must accompany any application for a geoduck fishery license.[51] The fishery license expires at the same time the harvest agreement terminates[52] and only permits the license holder to harvest the amount of geoduck authorized in the underlying harvest agreement.[53] If the harvester enters into a new harvest agreement, he or she must also obtain a new fishery license.

A holder of a geoduck fishery license does not necessarily have to obtain a geoduck divers license. The fishery license holder can arrange for geoduck divers to harvest the product allowed by the license. Likewise, the holder of a geoduck divers license is not required to obtain a fishery license if he or she is operating under the fishery license of another.

The price for a geoduck divers license is set in statute at $185 for Washington residents and $295 for non-residents.[54] The geoduck fishery license is set in statute to be a free, or no-fee, license.[55]

II. Allowable Gear Types

The Director of WDFW is instructed in statute to seek to conserve the geoduck fishery and to prevent damage to geoduck habitat. To carry out this charge, the Director is empowered to determine the number of geoduck fishery licenses issued for each harvest agreement, along with the number of gear units allowed for a particular harvest.[56] The legislature has directed that all commercial geoduck harvesting is to be done using manually operated, hand-held water jets or suction devices. These devices must be controlled by the diver, as opposed to someone above water.[57]

As an exception to the above rule, the Director is instructed to periodically determine the effect of the harvest gear on the geoduck population and habitat. If the Director determines that the permitted gear is being operated in a destructive manner, or that its use may cause permanent

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addressed later in this memorandum. Tribal fisheries are not bound by licensing regulations.

[50] See RCW 77.70.220(2).

[51] See WAC 220-52-01901(2).

[52] See RCW 77.70.220(4).

[53] See WAC 77.70.220(3).

[54] See RCW 77.65.440.

[55] See RCW 77.65.220(h).

[56] See RCW 77.20.220(5).

[57] See RCW 77.60.070 (2).

damage to the substrate or adjacent shellfish populations, then a modification or prohibition of the gear type may be instituted.[58] Using this authority, the Fish and Wildlife Commission has adopted, in rule, a requirement that each geoduck fishery license authorizes the holder to use two water jets.[59] The use of any other gear type is prohibited unless a permit is granted by the Director; however, the Director may not authorize the use of gear that penetrates the skin, neck, or body of the geoduck.[60] Each harvesting vessel is also limited to having a maximum of two divers in the water at any one time.[61]

III. Location and Time of Harvests

Non-tribal commercial harvest of naturally-occurring geoducks is prohibited outside of the boundaries established in a DNR geoduck harvesting agreement. In addition to the limitations set by the harvest agreement, geoduck harvest is also prohibited in waters shallower than eighteen feet, deeper than seventy feet, or that lie less than 200 yards from the shore.[62]

In addition to spacial restrictions, state administrative rules impose temporal restrictions on geoduck harvest. Commercial geoduck harvesters are permitted to operate only between 7:00 AM and 7:30 PM, or one-half hour before sunset, which ever is earlier. The actual harvest vessel may be on site as early as 6:30 AM, and may remain on site until 7:30 PM, regardless of the time that the sun sets. Geoduck harvesters are also prohibited from operating on Sundays and official state holidays.[63]

VI. Occupational Safety

Geoduck fishery license holders are required to comply with the commercial diving regulations

[58] See RCW 77.60.070 (2).

[59] See WAC 220-52-01901(3). The Commission has also adopted WAC 220-52-019(2) which specifies that all water jets must have a nozzle not exceeding 5/8 of an inch in diameter and must have through-hull fittings for the water discharge hoses connected above the surface of the water and visible at all times.

[60] See WAC 220-52-019(2)(a) & (4) and WAC 220-56-355(2)

[61] See WAC 220-52-019(7).

[62] See RCW 77.60.070(1) & WAC 220-52-019(11). The minimum depth for geoduck harvest is calculated using the mean lower low water line, and the minimum distance from shore is measured using the mean high tide line. Maximum depth is measured at any tide height. These harvest areas only apply to non-tribal geoduck harvesters.

[63] See WAC 220-52-019(3).

that were in force on May 8, 1979.[64] This duty belongs to both the actual fishery license holder, and any divers employed by the license holder to extract the authorized geoducks.

If the federal occupational health standards are violated, the Director of the WDFW may initiate actions to suspend or revoke the fishery license.[65] Any action taken against the license must follow a hearing conducted pursuant to the Administrative Procedures Act;[66] however, the Director must abort the revocation or suspension action if the harvester corrects the violation within 10 days of receiving written notice. In addition, the Director may not seek a suspension or revocation if the party violating the occupational safety standards is not the holder of the geoduck fishery licence, and the holder of the license terminates his or her business relationship with the diver until the safety standards have been satisfied.[67]

The Director can bypass the hearing requirement if there is a substantial probability that a violation of the occupational safety standards could result in death or serious injury. In this situation, the Director can immediately suspend a license until the violation has been corrected.[68]

A violation of an occupational safety standard also can lead to a termination of the DNR harvest agreement. Unlike a WDFW fishery license, the cancellation of a harvest agreement may be executed without a formal hearing under the Administrative Procedures Act.[69]

V. Requirements for Geoduck Harvest Vessels

The holder of a geoduck fishery license must designate a vessel operator who will be with the vessel at all times that the vessel is either commercially harvesting or has commercially harvested geoducks on board.[70] The geoduck harvesting vessel must also carry certain documentation at all times, including a copy of the harvesting agreement, a map of the harvest area, the appropriate number of geoduck divers licenses, and a geoduck fishery license.[71]

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[64] See RCW 77.70.220(6). The 1979 regulations were adopted by the federal Occupational Safety and Health Administration pursuant to 29 U.S.C. 651 et seq.

[65] See RCW 77.70.220(6).

[66] RCW Chapter 34.05.

[67] See RCW 77.70.220(6).

[68] See RCW 77.70.220(6)

[69] See RCW 79.96.080(2)

[70] See WAC 220-69-241(3).

[71] See WAC 220-52-019(8).

The designated operator of a geoduck harvest vessel is responsible for submitting fish receiving tickets each day for each tract of geoducks harvested. Each ticket must be signed and contain the number of geoducks harvested and the name of the vessel that harvested the geoducks. The ticket must be completed prior to leaving the geoduck tract.[72]

Certain activities are prohibited on board geoduck harvesting vessels. This includes a prohibition on the processing of geoducks on any harvest vessel, and a prohibition on the possession of only the neck or siphon portion of a geoduck on a harvest vessel.[73] In addition, a geoduck harvest vessel is prohibited from retaining any other food fish or shellfish.[74]

E. Tribes

In Washington, the geoduck resource is co-managed by both the state and the area tribes pursuant to harvest management plans. This arrangement was confirmed by a series of court cases eventually culminating in a court holding commonly referred to as the "Rafeedie decision."[75] The basis of the decision in the case involved an interpretation of language found in treaties entered into by area tribes and the federal government in the 1850's. That language guaranteed to the tribes that they would be able to continue to take fish at all usual and accustomed stations in common with non-tribal citizens, as long as the fish are not shellfish taken from staked or cultivated beds.[76]

Before reaching a final decision, the Rafeedie Court had to reach a series of conclusions about the treaty language in question. These include decisions that the term "fish" also includes "shellfish",[77] that the right to take fish is not limited to species the tribes were harvesting at the time of entering into the treaty,[78] and that tribes are allowed to harvest naturally-occurring

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[72] See WAC 220-69-241(3).

[73] See WAC 220-52-019(5)&(9). The neck or siphon of a geoduck may be possessed on board a harvest vessel if the animal was incidentally damaged during harvest. Such an occurrence must be reported to the Department of Natural Resources.

[74] See WAC 220-52-019(6). A geoduck harvest vessel can carry horse clams, when such activity is allowed under a Department of Natural Resource harvest agreement.

[75] The Rafeedie decision, named afer the judge issuing the decision, Edward Rafeedie, is actually titled United States of America v. State of Washington, 873 F. Supp 1422 (1994).

[76] This is a paraphrase of the treaty language. The actual text analyzed by Judge Rafeedie can be found at 873 F. Supp 1422 at 1427.

[77] See 873 F. Supp 1422 at 1430.

[78] See 873 F. Supp 1422 at 1430.

shellfish on private land, even if that shellfish is living on an artificially enhanced shellfish bed.[79]

In a subsequent court decision, Judge Rafeedie outlined an implementation plan that was designed to provide a framework for cooperative shellfish management.[80] One element of the plan was for the state and tribes to enter into, and comply with, management agreements for each species of shellfish .[81] The court order also enjoined the state of Washington from arresting tribal members while harvesting shellfish from their usual and accustomed places, and from applying state regulations that restrict tribal fishing rights.[82]

The state is represented in the geoduck management plan discussions jointly by the DNR and WDFW. Although both agencies present a unified state position, they divide their interests and each agency takes the lead on different aspects. For instance, the DNR takes the lead in discussions about developing harvest operations on geoduck tracts, weighing procedures, record keeping, and health certification issues. The WDFW takes the lead on discussions involving the adjustment of harvest shares to account for unreported fishing mortalities, revisions to population estimate methodologies, and the coordination of enforcement efforts.[83]

F. Geoduck Growers

I. Acquiring Aquatic Lands for Private Geoduck Aquaculture

Private enterprises plant and cultivate geoducks on approximately 65 to 70 acres of aquatic land in Washington.[84] Although, as a general rule, Washington's aquatic lands are owned by the state, some aquatic lands are held in private ownership. In a period of time from 1907 until 1979, 61% of the state's tidelands, and 30% of the state's shorelands were sold into private ownership.[85] In addition, state law declares that the state's aquatic lands lying below extreme low tide are subject

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[79] See 873 F. Supp 1422 at 1441. For instance, the tribes have a right to harvest naturally-occurring geoducks from a privately-owned artificial oyster bed.

[80] See United States of America v. State of Washington, 898 F. Supp. 1453 (1995).

[81] See 898 F. Supp. 1467.

[82] See 898 F. Supp. 1476.

[83] See section 4 of the memorandum of understanding between the State of Washington Department of Natural Resources and the State of Washington Department of Fish and Wildlife; agreement number FY02-200.

[84] See Should the Department authorize use of state-owned aquatic lands for geoduck aquaculture, a white paper released by the Department of Natural Resources. April 14, 2003.

[85] See Aquatic Lands Strategic Plan, Department of Natural Resources, 1992.

to thirty-year leases for shellfish cultivation or other aquacultural uses.[86] Although the DNR is authorized to lease land for geoduck growing, the agency has decided to not approve lease applications for these activities, citing concerns about potential negative effects on native geoducks and the surrounding ecosystem.[87]

Applicants to lease state-owned aquatic lands must generate a map of the area to be leased and submit it to the DNR with a $10 refundable deposit.[88] Once submitted, the proposed lease site must be surveyed by the WDFW to ensure that the establishment of a cultured shellfish bed will not damage natural oyster beds or hamper natural shellfish seeding. Area tribes must be given the opportunity to participate in this assessment of the natural shellfish beds.[89] If the WDFW finds that the proposed lease should not be entered into in order to protect natural oyster beds, then the DNR may not enter into the lease.[90] However, if the WDFW finds that the land may be leased, then the WDFW must again survey the land. In the second survey, the WDFW must report on the presence of naturally-occurring shellfish, and recommend a minimum rent based on the estimated value of the naturally-occurring shellfish on the land.[91]

The DNR may not execute a proposed lease if a tribe, at least 10 days before the proposed lease date, notifies the state that it believes that the aquatic parcel contains shellfish to which the tribe has a treaty right to harvest.[92] The proposed lease may only be executed after either: 1) the tribe, state, and lessee agree to a plan that ensures that the tribe's treaty right to take shellfish will remain intact[93]; or 2) the completion of a dispute resolution process that involves a special

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[86] See RCW 79.96.010.

[87] See Should the Department authorize use of state-owned aquatic lands for geoduck aquaculture, a white paper released by the Department of Natural Resources. April 14, 2003.

[88] See RCW 79.96.020.

[89] See United States of America v. State of Washington, 898 F. Supp. 1474 (1995), section 8.2.1 of the decision. The court orders demand that the state share the survey results with the tribes at least 30 days prior to leasing and make all underlying data and documents available for review.

[90] See RCW 79.96.030(1).

[91] See RCW 79.96.030(1).

[92] See United States of America v. State of Washington, 898 F. Supp. 1474 (1995), section 8.2.2 of the decision. If a tribe fails to make this assertion, it may not harvest on that parcel for up to 10 years.

[93] See United States of America v. State of Washington, 898 F. Supp. 1475 (1995), section 8.2.3 of the decision.

master deciding if the lease interferes with a treaty harvest.[94]

All leases must be entered into for a period of between 5 and 30 years, and prior to taking possession, the lessee must reimburse the state for the value of the shellfish existing on the land and for the expenses incurred by the WDFW in surveying the parcel.[95] If the lessee of any state-owned aquatic lands ceases to use the land for shellfish production, the lease is to be cancelled and possession will revert back to the state.[96]

II. Registering a Geoduck Aquaculture Operation

All aquatic farms are required to be registered with the WDFW prior to commencing activities.[97] The registration application must include, among other things, information concerning the species of shellfish to be cultivated, the culture methods to be used, and documentation of ownership or right of possession.[98]

III. Harvest from Planted Geoduck Beds

Private individuals engaged in the business of planting and growing geoducks meet the statutory definition of aquatic farmers[99]and are not required to obtain a permit from WDFW in order to harvest their product.[100] Likewise, an aquatic farmer is not bound by the water depth and

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[94] See United States of America v. State of Washington, 898 F. Supp. 1475 (1995), section 8.2.4 of the decision. If the special master finds that the lease does not allow the lessee to take a portion of the treaty harvest, the lease can go forward. If the special master reaches the contrary decision, the parties must reconsider the lease agreement.

[95] See RCW 79.96.030(1).

[96] See RCW 79.96.060. The DNR is instructed to insert the reversion clause in all shellfish lease contracts. Similarity, certain sales of aquatic lands can revert back to the state if they are not used for shellfish production. These lands are often referred to as "Bush Callow" lands, a reference to the names of the legislative acts that authorized the land sales. Treatment of Bush Callow lands can be found in RCW 79.90.570.

[97] See WAC 220-76-010.

[98] See WAC 220-76-020.

[99] See RCW 15.85.020. Aquatic farmers commercially cultivate "private sector cultured products". This same RCW section defines "private sector cultured products" to include shellfish that are cultivated on aquatic farms or that naturally seed on an aquatic farm that is under the control of an aquatic farmer. According to State of Washington v. Hodgson, 802 P.2d 129 (1999), geoduck harvest tracts under lease from the DNR are not considered private sector cultured products unless the harvester was under control of those tracts at time of the geoduck's natural planting.

[100] See RCW 77.65.010(4). The exemption from the general requirement that a WDFW permit is required to harvest shellfish only applies if the aquatic farmer is harvesting "private sector cultured products" as that term is

distance from shoreline requirements that affect the harvesters of naturally-occurring geoducks.[101] However, prior to harvest, a private party that is culturing geoduck must survey the aquatic land on which the geoduck are growing. The corners of the parcel must be marked with anchored buoys for the duration of the harvest period.[102]

Tribes are permitted to harvest natural stock from privately owned or operated shellfish beds. However, the tribe must provide notice to the owner prior to commencing harvest. Upon notice, the grower is responsible for providing to the tribe certain information, including the location of artificial beds, the species currently harvested, and evidence that shows that beds asserted by the owner to be artificial were indeed planted by the owner.[103] If the tribe agrees to the growers assertions, then the parties must agree on a tribal harvest level.[104]

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defined in RCW 15.52.020, and explained in footnote 99. In fact, under RCW 77.12.047(3), the WDFW is prohibited from promulgating any rules beyond those dealing with statistical reporting if they effect "private sector cultured products". RCW 77.115.040 does, however, require aquatic farmers to register with the WDFW.

[101] See RCW 77.60.070(1).

[102] See RCW 79.96.140

[103] See United States of America v. State of Washington, 898 F. Supp. 1469 (1995), section 6.1.1 of the decision.

[104] See United States of America v. State of Washington, 898 F. Supp. 1470 (1995), section 6.1.3 of the decision. If the parties do not agree, the matter will be forwarded to a special master for dispute resolution.